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Immigration Policy, Liberal Principles, and the Republican Tradition*

HOWARD F. CHANG**

INTRODUCTION

In *Democracy's Discontent*, Michael Sandel advances two primary theses: one is descriptive, the other is normative. First, Sandel claims that as a descriptive matter, the United States is a "procedural republic,"¹ in which "[t]he political philosophy by which we live is a certain version of liberal political theory."² Second, he urges as a normative matter that we should revive the rival republican political theory which liberalism has displaced in our political discourse.

Sandel devotes the first part of his book to a discussion of how liberal principles have come to dominate U.S. constitutional law in particular and our legal system in general. Sandel then devotes the second part of his book to a lengthy discussion of the "Political Economy of Citizenship,"³ in which he traces the influence of liberal and republican theories throughout U.S. political history.⁴ One might think that an important aspect of the political economy of citizenship would be immigration policy, the primary means by which we restrict access to citizenship itself. Oddly, however, Sandel includes virtually no discussion of the evolution of U.S. immigration policy.

A review of U.S. immigration policies leads us to qualify both of Sandel's theses. First, regarding his descriptive thesis, we would see that when it comes to immigration policy, our practices fail to exhibit the liberalism that we generally espouse in our political philosophy. Second, regarding his normative thesis, once reminded of the ugly role played by the republican tradition in supporting nativist immigration policies, we might be more wary of reviving this tradition. I will consider these two propositions in turn.

I. ILLIBERAL PRINCIPLES AND U.S. IMMIGRATION POLICIES

When it comes to immigration policy, we do not apply the liberal principles that Sandel finds so pervasive elsewhere in our legal and political culture. Our immigration policies routinely include discriminatory practices that are difficult

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1. MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 24 (1996).

2. *Id.* at 4.

3. *Id.* at 121.

4. *Id.* at 121-315.

to square with liberal theory. The courts have upheld these practices, indicating that the constitutional law doctrines applied in the context of purely domestic matters do not similarly constrain the federal government's plenary power over immigration.

A. VIEWPOINT DISCRIMINATION

Consider the principle of viewpoint neutrality developed by the Supreme Court to constrain government regulation of speech. This neutrality principle normally "insists that no restriction may be based on approval or disapproval of the speech in question"⁵ and "prevents majorities from imposing their will to suppress speech they happen to deplore."⁶ Yet our immigration laws discriminate explicitly among aliens based on ideology. In *Kleindienst v. Mandel*,⁷ the Supreme Court applied an extremely deferential standard of review to a law that made the teaching or advocacy of communism a basis for excluding an alien from the United States. The Court cited the plenary power that Congress exercises over immigration matters.⁸ The Court held that the First Amendment did not prevent the exclusion of an alien seeking to visit the United States, even an exclusion based on ideological grounds.⁹ This 1972 case remains good law, and ideological grounds for exclusion remain in our immigration laws.¹⁰

Instead of maintaining viewpoint neutrality, our immigration and nationality laws reflect a republican concern for "the qualities of character necessary to the common good of self-government."¹¹ This concern is most apparent in our requirements for naturalization, in which the United States literally "attends to the identity, not just the interests, of its citizens."¹² Our laws require that the immigrant demonstrate, among other things, that he or she "is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."¹³ Furthermore, our laws also prohibit the naturalization of certain classes of aliens defined by ideology, including members of communist parties.¹⁴ Our laws also require an oath of allegiance to the United States.¹⁵ Our practices in the naturalization context contrast sharply with the First Amendment principles applied, for example, in *West Virginia State Board of Education*

5. *Id.* at 74.

6. *Id.* at 89.

7. 408 U.S. 753 (1972).

8. *Id.* at 769-70.

9. *Id.* at 770.

10. See 8 U.S.C. § 1182(a)(3)(D)(i) (1994) (excluding any prospective immigrant "who is or has been a member of or affiliated with the Communist or any other totalitarian party").

11. SANDEL, *supra* note 1, at 25.

12. *Id.*

13. 8 U.S.C. § 1427(a) (1994).

14. See *id.* § 1424.

v. Barnette,¹⁶ in which the Supreme Court struck down a compulsory flag salute, declaring that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."¹⁷ While liberal principles may prevail with respect to our citizens, the republican tradition appears to be alive and well, guarding the points of entry into our political community.

B. SUSPECT CLASSIFICATIONS IN ADMISSION POLICIES

Consider the propositions that "[l]iberal justice is blind to such differences between persons as race, religion, ethnicity, and gender" and that "[t]he liberal state therefore does not discriminate."¹⁸ As a matter of constitutional law, this nondiscrimination principle has made little headway in the area of immigration. In *Fiallo v. Bell*,¹⁹ the Supreme Court upheld a law preventing any illegitimate child from immigrating based on the child's relationship to his or her natural father.²⁰ The statute discriminated on the basis of both sex and illegitimacy, because an illegitimate child could immigrate by virtue of a relationship to his or her natural mother, and a legitimate child could immigrate based on a relationship to his or her natural father. Although discrimination on the basis of either sex or legitimacy is disfavored as a matter of constitutional law, the Court applied a deferential standard of review to the law, citing the sweeping legislative power Congress enjoys over immigration and the limited scope of judicial review in the immigration area.²¹ This 1977 case remains good law, and although Congress later amended the statutory provision in question, the provision continues to discriminate on the basis of both sex and illegitimacy.²²

Furthermore, both our immigration and nationality laws have long discriminated among aliens on the basis of race and national origin. Only whites could naturalize until 1870, when Congress made blacks eligible to naturalize.²³ Asians generally could not naturalize until 1952, when Congress finally abolished all racial restrictions on naturalization.²⁴

Almost since their inception, federal laws regulating the admission of immigrants reflected concerns about the race and ethnicity of immigrants. Soon after Congress began to regulate immigration in 1875,²⁵ it enacted the Chinese

16. 349 U.S. 624 (1955).

17. *Id.* at 642.

18. SANDBLUM, *supra* note 1, at 13.

19. 430 U.S. 787 (1977).

20. *Id.* at 799.

21. *Id.* at 796.

22. See 8 U.S.C. § 1401(b)(1)(D) (1994) (including illegitimate children if they seek to immigrate "by virtue of the relationship of the child to its natural mother or to its natural father *if the father has or had a bona fide parent-child relationship with the person*" (emphasis added)).

23. See Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254, 256 (repealed 1952).

24. Immigration and Nationality Act, ch. 2, § 311, 66 Stat. 163, 239 (1952) (codified at 8 U.S.C. § 1422 (1994)) (stating that the right to naturalize "shall not be denied or abridged because of race").

Exclusion Act,²⁶ the first in a series of laws preventing the immigration of Chinese laborers.²⁷ Subsequent laws reflected anxiety regarding not only Asian immigration, but also immigration from eastern and southern Europe. In 1921, Congress enacted the first quantitative restrictions on immigration, creating a national-origins quota system. This system allocated visas to aliens based on their country of origin by setting an immigration quota for each country based on the proportion of current U.S. residents of that national origin.²⁸ This formula skewed the allocation of visas toward aliens from northern and western Europe and away from other aliens.

Congress finally repealed this biased quota system in 1965, but did not abolish national-origin quotas.²⁹ Instead, Congress changed only the formula for allocating immigration visas among countries, switching to a system of equal quotas for each country.³⁰ The United States continues to allocate most immigration visas among aliens according to their national origin on this basis, with each country receiving an equal quota regardless of population or of demand for these visas.³¹ Thus, we continue to ration access to visas through a quota system that we would be unlikely to tolerate as a rationing device in a strictly domestic context.³² These quotas constrain immigration from high-demand countries and cause longer waiting periods for individuals from these countries.³³ Aliens from Asia and Latin America have provided most of the demand for immigrant visas since 1965, and the effect of our national-origin quotas has been to restrict immigration from a handful of countries in Asia and Latin America. Thus, these vestiges of the national-origins quota system perpetuate some of the discriminatory effects of that system.

Nevertheless, the abolition of the national-origins quota system in 1965 allowed a shift in the ethnic composition of the stream of immigrants into the United States. Disturbed by this shift away from Europe and toward Asia and Latin America, Congress enacted a series of laws designed to increase the number of visas available for immigrants from countries "adversely affected" by the abolition of the national-origins quota system.³⁴ In 1990, Congress

26. Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943).

27. See, e.g., Act of May 5, 1892, ch. 60, 27 Stat. 25; Act of Oct. 3, 1888, ch. 1064, 25 Stat. 504; Act of July 5, 1884, ch. 220, 23 Stat. 115.

28. Act of May 19, 1921, ch. 8, § 2(a), 42 Stat. 5. Congress modified this system and made it permanent in 1924, Immigration Act of 1924, ch. 190, § 11(a), 43 Stat. 153, 159 (repealed 1965).

29. See Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

30. *Id.* § 2, 79 Stat. at 911-12.

31. See 8 U.S.C. § 1152(a)(2) (1994).

32. An ethnic quota system to govern college admissions, for example, would be unlikely to survive judicial review. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

33. See Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 *COLUM. J. TRANSNAT'L L.* 319, 328 (1993).

34. Immigration Act of 1990, Pub. L. No. 101-649, sec. 132, 104 Stat. 4978, 5000; Immigration Amendments of 1988, Pub. L. No. 100-658, sec. 2, 102 Stat. 3908, 3908; Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, sec. 314, 100 Stat. 3359, 3439; see Legomsky, *supra* note 33, at 329.

established the first permanent program of this type, allocating 55,000 "diversity" immigrant visas to "low-admission" countries.³⁵

Although these visas may diversify the ethnic composition of the *immigrant stream*, they will make the *population* of the United States *less* diverse. Stephen Legomsky noted the perverse effect of these so-called "diversity" visas, suggesting that they might be more appropriately called "anti-diversity" visas: "Each of these enactments made the proportions of immigrants who are ethnically similar to the . . . existing United States population higher than the percentages that either unrestricted immigration or country-neutral immigration criteria would have produced. In each instance that effect was clearly intended."³⁶ Congress intended to revive some of the discriminatory effects of the old national-origins quota system, despite the conflict between this type of discrimination and liberal principles: "If . . . we see immigrants as individual human beings, to be judged according to their individual needs and merits, then discrimination on the basis of nationality is difficult to defend."³⁷ The liberal state, as Sandel observes, "respects persons as persons."³⁸

C. DISCRIMINATION AGAINST ALIENS AFTER ADMISSION

Our laws discriminate not only among aliens when deciding whether to admit them, but also against aliens as a class after we admit them. For example, we discriminate against aliens after admission in terms of access to public entitlements. Under U.S. law, even before Congress enacted new restrictions in 1996, aliens generally were ineligible for most public entitlements, including Medicaid, Aid to Families with Dependent Children (AFDC), and food stamps, unless they were lawfully admitted for permanent residence.³⁹ Thus, not only undocumented immigrants but also aliens admitted to the United States temporarily as nonimmigrants, including temporary workers, were ineligible for most public benefits because they were not lawfully admitted for permanent residence. The recently enacted welfare legislation expands the range of public benefits from which nonimmigrants and undocumented immigrants are generally excluded: with only narrow exceptions, these aliens are ineligible for "any Federal public benefit."⁴⁰

This 1996 legislation also adds extensive new restrictions on the access of other aliens, including even legal permanent residents, to federal entitlement programs. In particular, an alien admitted for permanent residence after enact-

35. Immigration Act of 1990, Pub. L. No. 101-649, sec. 101, § 201(e); sec. 131, § 203(e), 104 Stat. 4978, 4982, 4997-99 (codified at 8 U.S.C. §§ 1151(e), 1153(e) (1994)).

36. Legomsky, *supra* note 33, at 330, 334.

37. *Id.* at 335.

38. SANDEL, *supra* note 1, at 13.

39. See 42 U.S.C. § 1396b(v) (1994) (limiting the eligibility of aliens for Medicaid benefits); *id.* § 602(a)(33) (limiting the eligibility of aliens for AFDC benefits); *id.* § 1436a (limiting the eligibility of aliens for public housing assistance); 7 U.S.C. § 2015(f) (1994) (limiting the eligibility of aliens for food stamps); DAVID CARLINER ET AL., *THE RIGHTS OF ALIENS AND REFUGEES* 214 (2d ed. 1990).

40. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, sec. 401(a), 1996 U.S.C.C.A.N. (110 Stat.) 2105, 2261 (to be codified at 8 U.S.C. § 1611(a)).

ment of the 1996 law is ineligible for "any Federal means-tested public benefit for a period of 5 years beginning on the date of the alien's entry into the United States," with only narrow exceptions.⁴¹ Furthermore, the 1996 law makes permanent resident aliens, including current recipients already admitted to the United States, ineligible for food stamps and for Supplemental Security Income, without regard to length of residence in the United States, with only narrow exceptions.⁴² Finally, the 1996 law permits states to exclude permanent resident aliens, including current recipients already admitted to the United States, from benefits under other federal programs, including Medicaid, and under state programs, without regard to length of residence in the United States.⁴³ While enacting these sweeping new restrictions, Congress adopted a statement of the "immigration policy of the United States" that includes the principle that "aliens within the Nation's borders not depend on public resources to meet their needs."⁴⁴

The Supreme Court applies a lenient standard of review to federal laws that discriminate against aliens.⁴⁵ In *Mathews v. Diaz*,⁴⁶ the Court held that Congress could provide federal medical insurance to citizens while restricting the access of aliens to this program.⁴⁷ The law in question extended certain Medicare benefits to aliens only if they had been admitted for permanent residence and had also resided in the United States for at least five years.⁴⁸ The Court rejected the argument that this law violates the Due Process Clause of the Fifth Amendment:

The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship For a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify . . . benefits for one class not accorded to the other⁴⁹

In particular, the Court pointed to the federal government's plenary power to regulate immigration, which entails sweeping discrimination against aliens:

In the exercise of its broad power over naturalization and immigration,

41. *Id.* sec. 403(a), 1996 U.S.C.C.A.N. (110 Stat.) 2265 (to be codified at 8 U.S.C. § 1613(a)).

42. *Id.* sec. 402(a), 1996 U.S.C.C.A.N. (110 Stat.) 2262-64 (to be codified at 8 U.S.C. § 1612(a)).

43. *Id.* sec. 402(b), 1996 U.S.C.C.A.N. (110 Stat.) 2264-65 (to be codified at 8 U.S.C. § 1612(b)) (allowing states to restrict alien access to designated federal programs); *id.* sec. 412, 1996 U.S.C.C.A.N. (110 Stat.) 2269-70 (to be codified at 8 U.S.C. § 1622) (allowing states to restrict alien access to state public benefits).

44. *Id.* sec. 400(2), 1996 U.S.C.C.A.N. (110 Stat.) 2260 (to be codified at 8 U.S.C. § 1601(2)).

45. "[A]lienage classifications created by federal law will be subjected to only the rational basis standard of review." JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 14.12, at 704 (4th ed. 1991) ("[I]t would appear that the federal government may use a citizenship classification so long as it is arguably related to a federal interest.").

46. 426 U.S. 67 (1976).

47. *Id.* at 69.

48. *See* 42 U.S.C. § 1395a(2)(B) (1994).

49. 426 U.S. at 78.

Congress regularly makes rules that would be unacceptable if applied to citizens. The exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government's power to regulate the conduct of its own citizenry. The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is "invidious."⁵⁰

Yet the Supreme Court has also recognized the tension between discrimination against aliens and the liberal principles underlying the Equal Protection Clause. The Court's deferential review of federal laws that discriminate against aliens contrasts sharply with the heightened scrutiny that the Court applies to state laws that discriminate against aliens. Five years before *Diaz*, in *Graham v. Richardson*,⁵¹ the Supreme Court recognized that discrimination against aliens may reflect popular prejudice against them or their lack of political power: "[C]lassifications based on alienage, like those based on . . . race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate."⁵² The Court held in *Richardson* that the Equal Protection Clause of the Fourteenth Amendment prevents a state from conditioning welfare benefits on either U.S. citizenship or residence in the United States for a specified number of years.

Gerald Rosberg suggests that the same reasoning applied to discrimination against aliens by the states in *Richardson* should apply to the federal government:

Aliens stand in the same position with respect to the federal government as they do with respect to the states. . . . They are as effectively excluded from the political process at the national level. . . . And aliens have suffered as long a history of purposeful unequal treatment at the hands of the federal government as they have at the hands of the states.⁵³

Rosberg notes that "[i]t is tempting to say that the goal of enhancing the economic well-being of citizens at the expense of aliens makes discrimination

50. *Id.* at 79-80 (footnotes omitted).

51. 403 U.S. 365 (1971).

52. *Id.* at 372 (citation & footnote omitted) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)).

[W]hen state . . . laws classify persons on the basis of United States citizenship for the purpose of distributing economic benefits, . . . the law will be subjected to strict judicial scrutiny. In this situation, the Court recognizes that classifications based on alienage should be deemed "suspect" and upheld only if necessary to promote a compelling or overriding interest.

NOWAK & ROTUNDA, *supra* note 45, at 703.

53. Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 314; *see id.* at 294 ("[I]f alienage is a suspect classification when made the basis of state legislation, should it not remain suspect when it is used by the federal government?").

'an end in itself' and is inherently illegitimate,"⁵⁴ but this claim would also imply that immigration restrictions are also suspect, because immigration restrictions by their very nature discriminate against aliens, supposedly in order to promote the welfare of citizens.

Indeed, Michael Perry argues that the federal power to discriminate against aliens follows logically from the federal power to restrict immigration:

Few would take issue with the proposition that the members of a political community may appropriately decide whether, to what extent, and under what conditions persons who are not members may enter the territory of the political community and share its resources and largesse. This . . . necessarily entails the view that a person, in some respects at least, is more deserving by virtue of his status as a citizen than a person who is not a citizen. And this view is inconsistent with the notion that alienage is a morally irrelevant status

. . . .⁵⁵

To deny that the federal government has the power to discriminate against aliens is to cast doubt on the federal power to exclude aliens. Thus, the Court refuses to apply close scrutiny to discrimination by the federal government against aliens, especially in the context of immigration policy.⁵⁶

D. THE ILLIBERAL NATURE OF IMMIGRATION RESTRICTION

At the most basic level, the failure to apply liberal principles in the context of immigration policies derives from the fundamentally illiberal nature of immigration restriction itself. Unable to reconcile immigration restrictions with liberal principles, the Supreme Court has, in effect, repeatedly concluded that these liberal principles do not apply in the immigration context. Liberal political theory creates a dilemma for the Court because liberal principles would seem to justify very little regulation of immigration.

For example, consider the theory of justice developed by John Rawls, who asks what principles people would choose behind a "veil of ignorance."⁵⁷ In this "original position," people know nothing about their own personal circumstances or traits. "They do not know how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general considerations."⁵⁸ This condition ensures that the parties

54. *Id.* at 307 (footnotes omitted) (quoting *Truax v. Raich*, 239 U.S. 33, 41 (1915)).

55. Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1061 (1979).

56. See *Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976) (justifying "a narrow standard of review of decisions made by the Congress . . . in the area of immigration and naturalization"). In *Diaz*, the Court distinguished *Richardson* by pointing to "the exclusive federal power over the entrance and residence of aliens." *Id.* at 84. The Court stressed that "the Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization." *Id.* at 86-87.

57. See JOHN RAWLS, *A THEORY OF JUSTICE* 136-42 (1971).

58. *Id.* at 136-37; see *id.* at 141 ("If a knowledge of particulars is allowed, then the outcome is biased by arbitrary contingencies.").

are "fairly situated and treated equally as moral persons."⁵⁹ Using Rawls's theory, Joseph Carens addresses the issue of immigration restrictions as a question of social justice.⁶⁰ In seeking a justification for the use of force to exclude aliens, "we don't want to be biased by self-interested or partisan considerations" and instead "can take it as a basic presupposition that we should treat all human beings, not just members of our own society, as free and equal moral persons."⁶¹ Carens identifies this premise as a basic feature of all liberal political theories.⁶² "We should therefore take a global, not national, view of the original position."⁶³ As Sandel observes, egalitarian liberalism raises the question "why *these* persons, the ones who happen to live in my country, have a claim on my concern that others do not."⁶⁴

If we begin with equal concern and respect for all persons, then immigration barriers are morally suspect and demand justification. All immigration restrictions discriminate against individuals based on their alienage, which in turn derives from immutable characteristics such as birthplace (that is, national origin) and other circumstances of birth such as parentage.⁶⁵ National origin appears to be a trait that Rawls would deem "arbitrary from a moral point of view."⁶⁶ Carens concludes that we cannot justify restrictions "on the grounds that those born in a given territory or born of parents who were citizens were more entitled to the benefits of citizenship than those born elsewhere or of alien parents."⁶⁷ Nor can we justify restrictions "on the grounds that immigration would reduce the economic well-being of current citizens."⁶⁸ Similarly, in a utilitarian calculation of global social welfare, "current citizens would enjoy no privileged position."⁶⁹ Carens concludes that "we have an obligation to open our borders much more fully than we do now."⁷⁰ Similarly, Bruce Ackerman concludes that immigration barriers are inconsistent with liberal principles: "I

59. *Id.* at 141.

60. See Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251, 255 (1987).

61. *Id.* at 256.

62. See *id.* at 265 (claiming that "our social institutions and public policies must respect all human beings as moral persons," which "entails recognition . . . of the freedom and equality of every human being"); *id.* at 269 (claiming "[n]o moral argument will seem acceptable . . . if it directly challenges the assumption of the equal moral worth of all individuals").

63. *Id.* at 256.

64. SANDEL, *supra* note 1, at 17 (noting that the "bounds of communal concern become difficult to defend" under egalitarian liberalism).

65. See Roger Nett, *The Civil Right We Are Not Ready For: The Right of Free Movement of People on the Face of the Earth*, 81 ETHICS 212, 224 (1971) ("May we expect the lesson which the Negro has taught his fellow Americans about denial of fair opportunities to be repeated on a broader scale, with the underprivileged of the earth demanding 'desegregation' of nation states?").

66. RAWLS, *supra* note 57, at 72.

67. Carens, *supra* note 60, at 261.

68. *Id.* at 262.

69. *Id.* at 263 ("[T]he utilitarian commitment to moral equality is reflected in the assumption that everyone is to count for one and no one for more than one when utility is calculated.").

70. *Id.* at 270. Carens condemns immigration restrictions: "Like feudal barriers to mobility, they protect unjust privilege." *Id.*

cannot justify my power to exclude you without destroying my own claim to membership in an ideal liberal state."⁷¹

Michael Walzer defends the power of "the sovereign state . . . to make its own admissions policy, to control and sometimes restrain the flow of immigrants" as a means to protect the national culture: "The distinctiveness of cultures and groups depends upon closure If this distinctiveness is a value, as most people . . . seem to believe, then closure must be permitted somewhere."⁷² It is difficult to justify immigration restrictions as a means to preserve a particular national culture, however, while remaining faithful to liberal principles.⁷³ Mark Tushnet observes that "limitations on entry attempt to preserve the existing distribution of values in a society, in a way inconsistent with a liberal state's commitment to the possibility of revising its own values as the values of its members change."⁷⁴ Tushnet concludes that "[t]here is therefore no principled reason to object to the transformation of the polity that will occur when those with different values enter."⁷⁵ As Carens concludes in his defense of open borders:

Open immigration would change the character of the community but it would not leave the community without any character. It might destroy old ways of life, highly valued by some, but it would make possible new ways of life, highly valued by others. . . . [C]onstraining the kinds of choices that people and communities may make is what principles of justice are for. . . . To commit ourselves to open borders would not be to abandon the idea of communal character but to reaffirm it. It would be an affirmation of the liberal character of the community and of its commitment to principles of justice.⁷⁶

71. BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 93 (1980).

72. MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 39 (1983).

73. For example, Carens notes that "restrictions on immigration for the sake of preserving a distinctive culture would be ruled out," because "in the original position . . . no one would be willing to risk the possibility of being required to forego some important right or freedom for the sake of an ideal that might prove irrelevant to one's own concerns." Carens, *supra* note 60, at 262. Carens argues that "the effect of immigration on the particular culture and history of the society would not be a relevant moral consideration, so long as there was no threat to basic liberal democratic values." *Id.* (basing this conclusion on his reading of RAWLS, *supra* note 57, at 325-32).

74. Mark Tushnet, *Immigration Policy in Liberal Political Theory*, in *JUSTICE IN IMMIGRATION* 147, 153 (Warren F. Schwartz ed., 1995); *see id.* at 154 ("[V]alue-based exclusions assume that the values constituting a polity are fixed, yet that assumption seems unfounded and arguably inconsistent with liberalism's basic commitments.").

75. *Id.* at 155 (footnote omitted). Tushnet adds, however, "the qualification that the community must satisfy minimum norms of political justice—the 'no tyranny' requirement." *Id.* at 157 n.25. Similarly, Ackerman concludes that the only legitimate reason for a liberal state to restrict immigration is to protect the liberal state itself. *See* ACKERMAN, *supra* note 71, at 95 ("The *only* reason for restricting immigration is to protect the ongoing process of liberal conversation itself. Can our present immigration practices be rationalized on this ground?").

76. Carens, *supra* note 60, at 270-71; *see also* Jost Delbrück, *Global Migration—Immigration—Multiculturalism: Challenges to the Concept of the Nation-State*, 2 *IND. J. GLOBAL LEGAL STUD.* 45, 62 (1994) (setting forth the ideal of the "Open Republic," which would accept "citizens of different ethnic, religious or cultural backgrounds" and would feature "tolerance, respect for others being different, and the readiness of each person to let herself or himself be enriched in her or his own personal development by the social diversity around her or him").

In short, one cannot justify our immigration restrictions using liberal political theory because this theory generates very few reasons to favor natives over aliens. Indeed, Sandel faults liberalism for failing to justify "the special responsibilities that flow from the particular communities I inhabit," including "obligations of solidarity" that "I may owe to fellow members."⁷⁷ Immigration restriction is a practice that requires such communitarian theories for justification.

II. THE DARK SIDE OF THE REPUBLICAN TRADITION

A review of our immigration policies, both past and present, reveals the ugly side of the republican tradition: nativism and exclusion. Sandel acknowledges that "[t]he republican tradition coexisted with . . . nativist hostility to immigrants; indeed it sometimes provided the terms within which these practices were defended."⁷⁸ He concedes that "nativist opponents of citizenship for immigrants" in "nineteenth-century America" offered republican theories to defend restrictive policies.⁷⁹ Nativism, however, is not merely a shameful feature of our past, reflected in a history that includes the Chinese Exclusion Act and the national origins quota system. Nativism afflicts our politics *today*, posing a clear and present danger of new anti-immigrant legislation.

A. THE NEW RESTRICTIONISM

A brief review of recent initiatives in the field of immigration underscores how hostility to immigrants is on the rise and producing a new wave of anti-immigrant proposals at both the state and federal level.⁸⁰ Many of these restrictionist proposals have become law. Others may become law in the near future.

In November 1994, the voters of California passed Proposition 187, which would deny undocumented aliens access to various public services, including education,⁸¹ in defiance of the Supreme Court's ruling in *Plyer v. Doe*,⁸² which held that states may not deny undocumented immigrant children the free public education that they provide to U.S. citizens and legal immigrants.⁸³ The Court stressed that "education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all."⁸⁴ Even the four dissenters in *Plyer* conceded that "it is senseless for an enlightened society to

77. SANDER, *supra* note 1, at 15.

78. *Id.* at 6.

79. *Id.* at 348.

80. See Kitty Calavita, *U.S. Immigration Policy: Contradictions and Projections for the Future*, 2 *ISN. J. GLOBAL LEGAL STUD.* 143, 149-50 (1994) ("Despite all the 'globalism' talk about breaking down walls and collapsing boundaries, immigration talk is increasingly restrictionist.");

81. See Proposition 187, § 7 (codified at CAL. EDUC. CODE § 48215 (West 1997)).

82. 457 U.S. 202 (1982).

83. *Id.* at 230.

84. *Id.* at 221 ("We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.").

deprive any children—including illegal aliens—of an elementary education” and that “it would be folly—and wrong—to tolerate creation of a segment of society made up of illiterate persons, many having a limited or no command of our language.”⁸⁵ A federal court enjoined implementation of much of Proposition 187, including the provisions covered by *Plyler*.⁸⁶ In 1996, however, the House of Representatives passed legislation that would have authorized states to exclude undocumented children from public schools.⁸⁷ Faced with a threatened veto by President Clinton, Republicans in Congress eventually deleted this provision from the immigration bill ultimately enacted into law, which nevertheless included a slew of other provisions to deal harshly with illegal immigrants.⁸⁸

Other bills pending in Congress seek to deny birthright citizenship to the children of undocumented immigrants and of nonimmigrant alien visitors.⁸⁹ The Fourteenth Amendment confers U.S. citizenship on anyone born in the United States.⁹⁰ The main purpose of this amendment was to establish the citizenship of blacks, which the Supreme Court placed in doubt in *Dred Scott v. Sandford*,⁹¹ but its effect is to create a general rule of universal citizenship by birth.⁹² Governor Pete Wilson of California and others recently called for a constitutional amendment that would prevent the children of undocumented immigrants from acquiring U.S. citizenship by birth,⁹³ and the Republican Party endorsed such proposals in its 1996 platform.⁹⁴

The current hostility to immigrants, however, is not limited to illegal immigrants. Recent welfare legislation has targeted both legal and illegal immigrants for new restrictions on alien access to public benefits.⁹⁵ Furthermore, legal immigration itself is also under attack. For example, in 1995 the U.S. Commission on Immigration Reform, headed by Barbara Jordan, urged Congress to adopt more restrictive immigration laws.⁹⁶ The Jordan Commission recommended sweeping changes in longstanding U.S. immigration laws, including a one-third reduction in the overall level of legal immigration into the United

85. *Id.* at 242 (Burger, C.J., dissenting) (footnote omitted).

86. See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995).

87. See *Showdown Looms over Public Education Measure in Immigration Legislation*, 73 INTERPRETER RELEASES 817 (1996).

88. See *Eleventh-Hour Agreement Folds Immigration Bill into Omnibus Spending Measure*, 73 INTERPRETER RELEASES 1281 (1996).

89. See *House Panels Hear Testimony on Birthright Citizenship*, 73 INTERPRETER RELEASES 97 (1996).

90. U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).

91. 60 U.S. (19 How.) 393 (1857).

92. See *United States v. Wong Kim Ark*, 169 U.S. 649, 676 (1898); THOMAS A. ALEINIKOFF ET AL., *IMMIGRATION: PROCESS AND POLICY* 993 (3d ed. 1995).

93. For a critique of such proposals, see Note, *The Birthright Citizenship Amendment: A Threat to Equality*, 107 HARV. L. REV. 1026 (1994).

94. See *Republicans Take Hard Line on Immigration*, 73 INTERPRETER RELEASES 1112 (1996).

95. See *supra* notes 40-44 and accompanying text.

96. See U.S. COMM’N ON IMMIGRATION REFORM, *LEGAL IMMIGRATION: SETTING PRIORITIES* (1995).

States.⁹⁷ These proposals would entail the most restrictive changes in U.S. immigration law since the introduction of immigration quotas in the 1920s. President Clinton immediately endorsed these proposals.⁹⁸ Senator Alan Simpson and Representative Lamar Smith, both Republicans, soon introduced bills to implement the Jordan Commission's recommendations.⁹⁹ With public opinion polls indicating that most voters believe that current immigration levels are excessive,¹⁰⁰ many observers predicted that these bills would pass with bipartisan support. These cuts in legal immigration proved controversial, however, and after heated debate, both the House of Representatives and the Senate ultimately voted to exclude these radical cuts from their immigration reform bills, ultimately enacting more limited new restrictions on legal immigration.¹⁰¹ Nevertheless, observers expect restrictionists to revive the Jordan Commission proposals in the near future.¹⁰²

B. THE SEARCH FOR A PUBLIC PHILOSOPHY

Sandel provides no assurance that the republican revival he urges will not lead to more nativism and exclusion. He warns: "Republican politics is risky politics, a politics without guarantees."¹⁰³ He recognizes that republican politics may encourage "those who would . . . shore up borders, harden the distinction between insiders and outsiders, and promise a politics to 'take back our culture and take back our country,' to 'restore our sovereignty' with a vengeance."¹⁰⁴ While Sandel criticizes liberalism's "cosmopolitan ethic . . . for insisting that the more universal communities we inhabit must always take precedence over more particular ones,"¹⁰⁵ he offers us little protection against "the narrow, sometimes murderous chauvinism into which ethnic and national identities can descend."¹⁰⁶ Instead, Sandel can only note that the choice be-

97. See *id.* at 11-12; Robert Pear, *Change of Policy on U.S. Immigrants Is Urged by Panel*, N.Y. TIMES, June 5, 1995, at A1.

98. See Robert Pear, *Clinton Embraces a Proposal to Cut Immigration by a Third*, N.Y. TIMES, June 8, 1995, at B10.

99. See H.R. 2202, 104th Cong. (1995) (the Smith bill); S. 1394, 104th Cong. (1995) (the Simpson bill).

100. See, e.g., Bruce W. Nelan, *Not Quite So Welcome Anymore*, TIME, Special Issue, Fall 1993, at 10, 11 (reporting that a Time poll found that 60% of those surveyed favored "changes in federal law to reduce the number of immigrants who enter the U.S. legally"); Rich Thomas, *The Economic Cost of Immigration*, NEWSWEEK, Aug. 9, 1993, at 18, 19 (reporting that a Newsweek poll found that 60% of those surveyed thought that immigration was "a bad thing for this country today").

101. See *House Approves Immigration Bill After Removing Legal Immigration Restrictions*, 73 INTERPRETER RELEASES 349 (1996); *Senate Approves Omnibus Immigration Bill After Removing Exclusion Provisions*, 73 INTERPRETER RELEASES 601 (1996).

102. See William Branigin, *Immigration Issues Await New Congress; Surging Legal Influx Will Be Among Topics of Renewed Debate*, WASH. POST, Nov. 18, 1996, at A1.

103. SANDEL, *supra* note 1, at 321.

104. *Id.* at 350 (quoting Patrick J. Buchanan, Speech at the Republican National Convention (Aug. 12, 1992), and his phrase quoted in Richard L. Berke, *A Conservative Sure His Time Has Come*, N.Y. TIMES, May 30, 1995, at A1).

105. *Id.* at 343.

106. *Id.* at 342.

tween our obligations to humanity as a whole and more parochial interests "is a matter of moral reflection and political deliberation that will vary according to the issue at stake."¹⁰⁷

A cursory examination of our immigration politics reveals no shortage of those urging protection of our "language, culture, and national identity."¹⁰⁸ We should be reluctant to endorse preferences for the cultural status quo as a justification for immigration restrictions, however, especially given the ugly role played by racism and xenophobia in the formulation of U.S. immigration policies in the past.¹⁰⁹ The Senate Judiciary Committee relied upon such preferences in defending the national-origins quota system in 1950 as "a rational and logical method of . . . restricting immigration in such a manner as to best preserve the sociological and cultural balance in the population of the United States."¹¹⁰ It was our recognition of the illegitimacy of our preference for the ethnic status quo that motivated Congress in 1965 to eliminate this quota system.¹¹¹ Yet today nativists like Peter Brimelow are quite explicit in their expressions of alarm regarding the racial complexion of the immigrant stream into the United States.¹¹²

What is most sadly lacking in our political discourse regarding immigration is greater fidelity to our liberal ideals, especially the principle of equal concern and respect for all persons. As Sandel observes: "Principles are one thing, politics another, and even our best efforts to live up to our ideals seldom fully succeed."¹¹³ Our first priority here should be to improve our adherence to liberal principles. Sandel is correct to emphasize the need to cultivate civic virtue, but when it comes to immigration politics, the virtue that we most need

107. *Id.* at 343.

108. *Id.*

109. See Tushnet, *supra* note 74, at 150 ("A more realistic view, informed by the history of immigration policy, would be more skeptical about such policy. Rather than admirable efforts to . . . preserve morally valuable communities, present immigration practices seem racist and ethnocentric."). Michael Trebilcock criticizes Walzer's communitarian justification for immigration restrictions:

I see no role at all for variables relating to applicants' ethnic or cultural backgrounds, despite efforts by Walzer and others to justify exclusions on grounds of preserving cultural homogeneity—"they are not like us." This form of communitarianism has been invoked in the past to justify some of the most egregious forms of racial and religious discrimination in the history of Canada and the United States.

Michael J. Trebilcock, *The Case for a Liberal Immigration Policy*, in *JUSTICE IN IMMIGRATION*, *supra* note 74, at 219, 240; see U.S. COMM'N ON CIVIL RIGHTS, *THE FURNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION* 7-12 (1980) (reviewing the history of discrimination in U.S. immigration policies).

110. S. REP. NO. 81-1515, at 455 (1950).

111. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 109, at 11 ("The national origins immigration quota system generated opposition from the time of its inception, condemned for its attempts to maintain the existing racial composition of the United States.").

112. See PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER* 58-73 (1995) (describing white America as caught between the "pincers" of Hispanic and Asian immigration).

113. SANDEL, *supra* note 4, at ix.

to cultivate is the virtue extolled by liberals: "toleration and respect for others."¹¹⁴ We should tend to the urgent task of cultivating liberal toleration, which seems to be in short supply in the politics of immigration. What we need most is to promote the "cosmopolitan ideal," which Sandel concedes "rightly emphasizes the humanity we share and directs our attention to the moral consequences that flow from it."¹¹⁵ The last thing we need is to add more fuel to the fires of nativism and intolerance.

114. *Id.* at 321.

115. *Id.* at 341.